

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Qwest Corporation for)	WC Docket No. 04-223
Forbearance Pursuant to 47 U.S.C. §160(c))	
In the Omaha Metropolitan Statistical Area)	

**COMMENTS OF THE
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

1. Introduction and Summary.

The Qwest Petition, above, consists of two principal components: the facts of its case and the legal standards to which those facts are applied. The fact case addresses non-dominance, is substantial, and follows the requirements set out in the *AT&T Reclassification Order*¹ and the *Comsat Reclassification Order*.² Qwest offers significant evidence that it no longer exercises “market power” in the Omaha MSA on the basis of market identification (geographic and product), market participants, demand and supply elasticities, carrier characteristics (costs, size, structure, and resources), and market share.

From this fact foundation, Qwest offers two primary legal arguments for regulatory relief, both premised upon forbearance.³ In the first, it asks forbearance under §160(c) from the application of §251(c) and §271 of the 1996 Act. In the second, it requests

¹ *In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, FCC 95-427, 11FCC Rcd 3271 (1995).

² *In the Matter of Comsat Corporation; Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083 (1998).

³ Qwest also makes an abbreviated third forbearance argument resting upon an interpretation of §251(h) (1) of the Act in connection with the classification of incumbent carriers (*see* Qwest Petition at 38-39).

forbearance under §160(c) from dominant carrier regulation under §214 of the 1934 Act, as amended, and related specified portions of Part 61. In each request, Qwest addresses the requirements of §160(a) (1)-(3) and (b).⁴

Qwest's factual case must speak for itself. ITTA believes it clearly addresses issues concerning reclassification to non-dominant status; but forbearance, rather than non-dominance, is the direct relief repeatedly requested. ITTA's concerns, and the occasion for these Comments, arise from this blended approach to deregulation which (perhaps unintentionally) blurs the distinctions between "forbearance" and "non-dominance."⁵ Forbearance and non-dominance may come to similar ends, but they are not the same thing. They have different legal origins, entail different evidential standards, reflect different policy perspectives, and involve different legal consequences. The Qwest petition suggests they may be interrelated, but historically they have been used independently to reduce the burden of regulation whenever the circumstances warrant.

Clarifying this distinction now is appropriate since the Commission can reasonably anticipate more petitions like Qwest's in the near future. The vast changes in the competitive landscape occurring since formulation of dominant carrier regulation 25 years ago have undercut its rationale, rendering such regulation pointlessly harmful to incumbent carriers and materially detrimental to the public interest. Many midsize companies, now facing conditions which fully justify relief under both the *AT&T/Comsat*

⁴ These subsections include the need (i) to ensure just and reasonable rates and terms and to avoid unjust or unreasonable discrimination, (ii) to protect consumers, and (iii) to maintain the public interest (including the promotion of competitive market conditions).

⁵ Compare Qwest Petition, Section III and IV titles ("The Commission Should Forbear from Applying Specific Section 251(c) and 271 Regulatory Requirements to Qwest" and "Qwest Seeks Forbearance from Dominant Carrier Regulation in the Omaha MSA") with pp. 31-32: "In particular, Qwest seeks a declaration that it is not dominant in the provision of telecommunications services in the Omaha MSA and, consequently for forbearance from dominant carrier regulation in the Omaha MSA pursuant to Section 10(c) of the 1996 Act."

standards and the standards for forbearance adopted by Congress in §10 of the 1996 Act,⁶ are considering their deregulatory options and will look to this proceeding for further guidance in formulating their own applications.

Accordingly, ITTA, on behalf of its midsize company members,⁷ addresses certain aspects of dominance and forbearance raised by the form and content of Qwest's specific petition, distilled into the following two propositions:

- Any carrier that can establish the historical conditions of non-dominance is entitled to non-dominant treatment, irrespective of the requirements attending §160 forbearance; and
- The standards for forbearance under §160 are prospective in nature and are not confined to the showings of historical harm inherent in dominant carrier tests.

Affirmation of these points by the Commission in this proceeding will avoid uncertainty in future proceedings, as more petitions for regulatory relief materialize for Commission review and disposition.

2. A carrier establishing the historical conditions of non-dominance is entitled to non-dominant treatment, irrespective of the requirements attending §160 forbearance.

"Dominant" carrier regulation antedates the 1996 Act. The Commission developed this body of deregulatory concepts in the period between 1979 and 1985⁸ with the objective of separating those carriers believed to have market power (dominant) from those lacking such power (non-dominant). The former, including midsize companies, bear significant regulatory burdens unshared by non-dominant carriers:

⁶ 47 U.S.C. §160.

⁷ ITTA represents and acts on behalf of the legislative and regulatory interests of its membership, comprising 12 incumbent local exchange carriers serving more than 10,000,000 access lines in 40 states.

⁸ See, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, 77 FCC 2d 308 (1979) and subsequent proceedings.

By contrast [to non-dominant carriers], the Commission continues to treat incumbent LECs as dominant carriers and, absent a specific finding to the contrary for a particular market, these carriers remain subject to tariff filings, tariff support and price requirements.⁹

Over time, carriers labeled dominant have sought reclassification as a means for escaping the burdens imposed by this asymmetrical regulatory structure. In response, the Commission has established precedent affirming the availability of reclassification and identifying the tests for determining when to grant it. The *AT&T* and *Comsat Reclassification Orders* relied upon in the Qwest Petition fully describe the dominant/non-dominant reclassification standards established then and available today for effecting this change in regulated status.

That body of precedent neither relies upon nor requires the invocation of §160. The *AT&T* case, being decided in the year before enactment of §160, obviously applied non-dominant standards and reached a conclusion without benefit of the 1996 Act provisions on forbearance. The *Comsat Reclassification Order*, issued two years after the 1996 Act, involved a §160 forbearance request, but that request was made in the alternative to an unalloyed ‘classic’ non-dominance argument upon which *Comsat* primarily relied:

Comsat now petitions the Commission seeking reclassification as a non-dominant common carrier in the provision of its INTELSAT switched voice, private line and international video transmission services and the elimination of structural separation and rate of return regulation of its INTELSAT services. Alternatively, Comsat requests that the Commission forbear, under Section 10 of the Communications Act, from dominant common carrier regulation of its tariffs for INTELSAT services and from structural separation and rate of return regulation of its INTELSAT services.¹⁰

The Commission further clarified that it was treating *Comsat*’s forbearance request as one directed to specified rules, rather than to the issue of dominance, generally:

⁹ *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (rel. March 10, 2004) at ¶ 75.

¹⁰ *Comsat Reclassification Order* at ¶ 14 (emphasis added).

We treat Comsat's request as one for forbearance from enforcement of Sections 61.58 and 61.38 of the Commission's Rules and the streamlined tariff requirements imposed on Comsat in the *August 1996 Order* and *August 1997 Order* with respect to those markets in which Comsat remains dominant.¹¹

Comsat was granted relief in that proceeding under classic dominant/non-dominant tests for market power antedating the 1996 Act. It was denied relief with respect to the forbearance request arising under the Act.¹²

For reasons no doubt sound to it, Qwest has apparently emulated Comsat's use of forbearance as an avenue for achieving non-dominance. But it did not also clearly emulate Comsat in seeking a direct non-dominant carrier determination, outside the forbearance paradigm. While this approach may have independent merit, it is not compelled by applicable precedent.

However the Commission decides the Qwest Petition on the facts, it should leave intact the procedural ability of a carrier to shed dominant carrier burdens on the basis of classic non-dominance tests, alone. Commingling dominance with forbearance may serve in subsequent proceedings to confuse two important legal issues: which legal standards apply, and what legal consequences result. Blurring the proper legal standard applicable to each form of regulatory relief potentially leads to the result that all standards apply indiscriminately in all cases. This result would multiply the evidential burdens on those seeking regulatory relief and benefit only those who see regulation as a way of hamstringing their competitors.

Separately, mixing non-dominance with forbearance could mismatch the relief being sought with the case being presented. The Qwest Petition exemplifies this problem

¹¹ *Comsat Reclassification Order* at ¶ 139. The Qwest Petition also identifies specific statutes and rules from the burden of which relief is sought, *e.g.*, at 22, 26-27, and 32.

¹² See *Comsat Reclassification Order* at ¶¶ 2, 3.

when it mixes evidence of non-dominance with a request for general §251(c) forbearance under §160. Several midsize companies (as well as other small ILECs) rely on Qwest for transiting and tandem switching services throughout Qwest's many serving areas, now available under §251(c) resale provisions. The Petition's non-dominance evidence, being largely focused on unbundled network elements and the consequences of relief on end user and other retail markets, does not adequately address the effects on wholesale carrier markets. Carrier customers of Qwest, no less than individual consumers, are entitled to the protections of the three-part test mandated by §160(a) – a consideration the Petition masks by trying to make non-dominance evidence serve forbearance ends. This issue and others are latent in the Petition but not addressed by it, further underscoring the problems of Qwest's mix-and-match approach to regulatory relief.

Most importantly, commingling these two deregulatory avenues would dilute or negate important policy distinctions between them, including particularly the deregulatory preferences expressed by Congress in the 1996 Act (matters developed in the next section, *infra*). In ITTA's view, public policy and consumer welfare require that every existing avenue for rectifying the competitive imbalances now imposed by asymmetrical regulation be kept open and available for removing such regulation. Maintaining the distinctions between dominance and forbearance serves these ends.

In so arguing, ITTA is not in any way endorsing dominant carrier regulation or the tests historically applied for reclassification. Classic non-dominance, as discussed hereafter, focuses too much retrospective attention on economic harm sustained by an incumbent, and gives too little prospective attention to avoiding harm to consumers and competition. But a flawed remedy is better than no remedy. Qwest could have sought

non-dominant treatment solely on the basis of existing dominant carrier precedent. Its apparent decision not to do so should in no way constrain future ITTA and midsize company efforts to seek appropriate relief under the separate precedent established by past Commission determinations.

3. Unlike dominant carrier tests, the standards for forbearance under §160 are prospective in nature and are not confined to showings of historical harm.

As the Qwest Petition demonstrates, non-dominance tends to focus on showings of economic hardship already sustained by an incumbent. The context is largely retrospective and one-sided in nature – how many competitors have entered the market (whether on an economically rational basis or not); how much market share has the incumbent lost (whether because of its actual competence or not); how many alternatives in products or services have emerged (whether the incumbent is able to bundle and price responsively or not); and so on. The greater the sustained incumbent hardship, the more comfortable regulators seem to be with reclassification.

But hardship imposed on an incumbent does not equate to benefit conferred on the consumer. Regulation, improperly applied, detracts from consumer welfare by impairing the operation of competitive markets.¹³ As the Qwest Petition¹⁴ and the *AT&T* case¹⁵

¹³ Alfred E. Kahn, *Deregulation: Micromanaging the Entry and Survival of Competitors*, Edison Electric Institute (Washington, D.C. 1998) at 7:

[G]overnment interventions must aim to provide *fair competitive opportunities*, not to *protect competitors from efficient competition*. Any attempt to deny incumbent utility companies the benefit of or handicap them in exploiting genuine efficiency advantages threatens to *suppress competition* and denies consumers its full benefits. [Emphasis in the original].

¹⁴ Qwest Petition at 36.

¹⁵ The burdens of regulation were described inversely by the Commission in the *AT&T Reclassification Order* when it identified the benefits which AT&T would receive from non-dominant treatment:

First, AT&T will be freed [sic] from price cap regulation for its residential, operator, 800 directory assistance, and analog private-line services. Second...AT&T will be allowed to file tariffs...on one day's notice, and the tariffs will be presumed lawful. AT&T will no longer have to report or

discuss, this impairment occurs in many ways: by conferring market advantages upon some entities at the expense of the incumbent; by disincentivizing potentially beneficial incumbent pricing structures; by encouraging arbitrage and other uneconomic activity by other entities; and by directly increasing incumbent overhead expenses and thus the cost of goods sold. Restraining incumbents in these ways reduces competitive pressures on other providers. As a result, consumers receive less benefit from all providers than a symmetrically deregulated market would afford.

In contrast to the drawbacks of this retrospective approach, Congress established a prospective approach for forbearance. Under §160, the Commission is specifically enjoined to consider deregulation in terms of what such deregulation “will” accomplish and to act when action “will” produce a competitive result.

(b) COMPETITIVE EFFECT TO BE WEIGHED. -- In making the determination under subsection (a)(3) [“consistent with the public interest”] the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.¹⁶

“COMPETITIVE EFFECT” is not limited to something that has happened in the past; it comprehends something that will be achieved in the future. Unlike the case with classic dominant carrier analysis, harm to incumbents, to consumers, and to markets does not

file carrier-to-carrier contracts. Third...AT&T will automatically be authorized to extend service to any domestic point... [and] will also only have to report additional circuits to the Commission on a semi-annual basis...Fourth...AT&T will not have to submit cost-support data now required for above-cap and out-of-band filings, or the additional information it is now required to submit with tariff filings for new services and services subject to price caps. Fifth, declaring AT&T non-dominant will release [sic] AT&T from annual reporting requirements, including requirements that it file several ARMIS-like reports, an annual financial report, a depreciation rate report, an annual rate-of-return report, and a report on access minutes.

AT&T Reclassification Order at ¶ 12. The magnitude of the relief granted fairly mirrors the magnitude of the burden endured.

¹⁶ 47 U.S.C. §160(b).

have to be incurred before forbearance relief can be granted. If forbearance now “will promote” competitive market conditions later, the statute is satisfied.

This prospective approach contrasts favorably in another way with the dominant carrier approach, as the latter permits the Commission to postpone action in the name of imagined harms, while allowing actual harm to occur. In this regard, it echoes Chairman Powell’s general observation about regulatory interventionism:

[W]e speculate about possible anticompetitive effects and then adopt policies intended to protect new entrants and consumers from them. Rather than protect these interests, however, we more often, in practical effect, handicap the market and postpone the arrival of competition and consumer choice. Communications leaders must not give into these fears so lightly and instead must have the courage to trust the market.¹⁷

This is a fair summary of the drawbacks inherent in dominant carrier regulation and a strong argument for maintaining a prospective viewpoint when exercising the forbearance powers granted by Congress under §160.

¹⁷ Michael K. Powell, Commissioner, FCC, *Working Toward Independents’ Day: Mid-Size Carriers as the Special Forces of Deregulation*, Remarks, Independent Telephone Pioneer Association, Washington, D.C. (May 7, 1998) at 3.

4. Conclusion

The Qwest Petition exemplifies how the continuing application of asymmetrical regulation harms consumers and competitive markets, along with incumbent carriers. But it also tends to confuse important differences between non-dominance and forbearance. As a policy matter, reclassification to non-dominant status, while it cannot correct past damage to markets and consumer welfare, is still better than perpetuating such harm into the future. But it is not as good as forestalling such harm immediately, through timely forbearance. The forbearance provisions of the 1996 Act reflect this difference and grant the Commission full authority in §160 to act on the basis of prospective public interest benefits. By bearing in mind the distinctions between “dominance” and “forbearance,” the Commission can effectively carry out congressional intent and deliver to consumers the products a truly competitive, symmetrically deregulated marketplace can deliver.

Respectfully submitted,

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